REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 2 OF 2016

(From original conviction and sentence in criminal

Case No. 269 of 2012 of the Principal Magistrate's Court at Wang'uru)

DWM.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant DWM was charged with the offence of defilement contrary to ***Section 8(1)(3) of the Sexual Offences Act*** before the Principal Magistrate's Court at Wang'uru Cr. Case No. 269/2012. He denied the charge and after a full trial he was convicted and sentenced to life imprisonment.

2. He was dissatisfied with the conviction and the sentence and filed this appeal. He filed supplementary grounds of Appeal and raised the following grounds:-

> ***1. THAT the Learned Trial Magistrate erred in law and infact by convicting the Appellant under a different Section of the Law other than that which he was charged under.***
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> ***2. THAT the Learned Trial Magistrate erred in law and infact in failing to appreciate that the full ingredients of the offences were never proved.***
>
> ***3. THAT the Learned Trial Magistrate erred in law and infact by convicting the Appellant while relying on evidence that was uncorroborated and in the absence of ant tangible evidence that could link the Appellant directly to the offences.***
>
> ***4. THAT the Learned Trial Magistrate erred in law and infact by failing to take into consideration the fact that the evidence tendered in Court was full of contradictions and inconsistencies.***
>
> ***5. THAT the Learned Trial Magistrate erred in law and infact in failing to give due and or adequate consideration to the Appellant's plausible defense.***
>
> ***6. THAT the Learned Trial Magistrate erred in law and infact by arriving at a judgment that is legally and procedurally defeating in failing to appreciate that the prosecution did not prove the case beyond reasonable doubt.***
>
> ***7. THAT the Learned Trial Magistrate erred in law and fact by passing a sentence which was manifestly harsh and excessive in the circumstances, in any event.***

3. He prays that the appeal be allowed, the conviction be quashed and the sentence imposed be set aside.

4. The appeal was opposed by Respondent through Mr. G. Obiri Assistant Director of Public Prosecutions. He prays that the appeal be dismissed.

5. The parties agreed to canvass the appeal by way of written submissions. For the appellant the submissions were filed by Njuguna Jacqline. For the respondents submissions were filed Mr. G. Obiri Assistant Director of Public Prosecutions.

6. The facts of this case are that the complainant BW who stated she was aged four years at the time she testified on 3/7/12, was living with

her parents. While at home with her Aunt, W who is the appellant took her to the bathroom and held her mouth with his hand. He told her to keep quiet. The appellant removed her clothes then removed his genital and put it on her genital. The genital did not get inside. She did not feel pain but felt pain afterwards when she was urinating. The accused left the bathroom and she followed. The complainant did not tell anyone. Later she informed her mother that she was feeling pain when passing urine. The mother checked her. She was then escorted to hospital. PW-2- CWM the complainants mother received the report on 2/4/12 and on checking her genitalia she noticed that the complainants genetalia was gaping open and was reddish. She (PW-2-) called her husband who also examined the complainant and took her to hospital. The matter was reported to the police. The complainant was examined at Karira Hospital. The Doctor, Mahinda Liza Wanjiru (PW-5-) who examined the complainant found that the external genitalia was normal with no bruises nor tears. There was reddening around the labia. The hymen was broken. The findings correspond with forced entry. She produced the P3 form and the treatment notes. The appellant was arrested and charged.

7. The appellant gave unsworn defence and advanced a defence of 'alibi'.

8. I have considered the appeal, the grounds of appeal and the submissions. This is a 1st appeal and this court has a duty to reconsider and re-evaluate the evidence tendered before the trial court and makes its finding. This court must bear in mind that it did not see or hear the witnesses when they testified and leave room for that. This was stated in the ***case of Mwangi-v- Republic(2004)2 KLR 28 where the Court of Appeal*** stated:-

> ***a) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
>
> ***b) The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.***
>
> ***c) It is not the function of the first appellate court merely to scrutinize the evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.***

9. Based on this I have considered the evidence tendered before the trial court. The 1st issue determination is whether the charge sheet used in Wang'uru Criminal case was defective. The appellant submits the charge sheet was defective as the accused was charged with the wrong charge. The accused was charged under **Section 8(1) as read with Section 8(3) of the Sexual Offences Act** which provides:-

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

10. The particulars of the charge state that the complainant was child aged 5 years.

12. The age of the complainant determines the sub-section under which an accused person is charged with the offence of defilement. The prosecution embarks to proof the charge and the particulars beyond any reasonable doubts. The charge and the particulars were at variance. The complainant was born on 26/1/2007 as per the birth certificate which was produced as **exhibit -2-** which means she was five years at the time the offence was committed. **Section 8(2) of the Sexual Offences** was the relevant Section under which the accused should have been charged. A look at the charge sheet reveals that the charge sheet was amended to read **Section 8(1) as read with Section 8(3). Sub-section -3-** covers victims whose ages is between 12-15 years. The appellant ought to have been charged under **Section 8(1) as read with Section 8(2)** which covers victims who are aged eleven years or less.

13. The charge and the particulars are at variance and has cast doubts on the prosecution case. Doubts arise since the state amended the charge an indication that the victim was in the age bracket of Eleven years and above. The State then presents a minor aged Five Years in the particulars of the charge.

14. The appellant was prejudiced as he was sentenced under a provision that he was not charged with. **Section 8(2)** provides for imprisonment for life while **8(3)** provides a sentence of not less than 20 years. The trial Magistrate at Page 52 of the record stated as follows:-

> ***"Court has noted the mitigation by accused person. However penalty prescribed in law for the offence wich accused is convicted with is mandatory. The accused is hereby sentenced to life imprisonment."***

15. The charge did not mandatorily provide a life imprisonment. The trial Magistrate erred in sentencing the appellant to a mandatory life imprisonment when the charge before her did not provide for that kind of sentence.

16. The appellants right to fair trial was violated**.** ***Article 50 (2)(b) of the Constitution*** provides:-

> ***" Every accused has a right to a fair trial which includes the right –***
>
> ***To be informed of the charge with sufficient details to answer it"***

17. Where the State prefers a specific charge, it is expected to give sufficient details. In this case the State was supposed to give particulars supporting the charge under ***Section 8(1)(3) of the Sexual Offences Act.*** The particulars were not given. The right to fair trial cannot be limited. **Article 25(c) of the Constitution** provides that right to fair trial shall not be limited.

18. The State has submitted that the error can be cured under ***Section 382 of the Criminal Procedure Code***. The State admits that there was an error. The Section can only cure the error if there was no failure of justice. In this case miscarriage of justice was occasioned as the appellant was sentenced for an offence not charged and there was a violation of the right to fair trial. The issue of whether the charge sheet was defective must be resolved in favour of the appellant. I find that the charge sheet was defective and occasioned a miscarriage of justice.

19. The appellant has raised the issue that the trial Magistrate was wrong in her analysis of the evidence facts. I find that the Magistrate stated facts in her Judgment which was not in the evidence tendered before her. The trial Magistrate stated that – at page 53 – ***"the complainant stated that the accused person inserted his genitalia into her genitalia."***

The complainant at Page 15 stated:-

> ***"He put it on my genital, it did not get inside. The accused almost put his genital inside mine but he did not insert it. He only put it on my genitals. I did not feel pain ------"***

20. The Judgment of the trial Magistrate was based on facts which were not supported by the evidence tendered before. This was an irregularity which occasioned a miscarriage of justice as the conviction was not based on evidence tendered before the trial Magistrate but on extraneous facts. The ground has merits. A conviction based on evidence not adduced before the trial Magistrate is a violation of the appellants right to fair trial.

21. The appellant submits that the trial Magistrate did not pass a sentence capable of being passed. This is not supported by the record. The trial Magistrate did indicate that the appellant was sentenced to life imprisonment. The ground is a sham.

22. The Fourth ground is whether the Prosecution proved the case beyond any reasonable doubts. In this regard, I will first consider the evidence of the complainant. She was a child of tender years who gave unsworn statement. Her evidence requires corroboration. I am minded that this is a sexual offence and a court can convict on the evidence of a victim alone. ***Section 124 of the Evidence Act*** provides:-

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".***

23. The complainant gave unsworn evidence. The trial Magistrate did not state that she believed the complainant as required under the section. The evidence required corroboration. This was not to be. PW-3- who was the house help testified that she washed the complainant. She did not note any blood stains on the clothes or on her pant. She said the complainant but her legs together and flinched in pain. It cannot be stated that the pain was due to defilement. The Doctor stated that the complainant had inflammation. This could have been due to an infection. ***"Inflammation is the body's way of protecting itself from infection, illness, or injury. As part of inflammatory response the body increases its production of white blood cells, immune cells and substances called cytokines that help fight infection."*** **Quoted from Healthline.com on line.**

24. Inflammation is a process of the body to fight against things that harm it such as infections. Symptoms are pain, redness or swelling. Since PW-3- did not see any blood it raises doubts as to whether the complainant was defiled on the material day.

25. The second aspect of the complainants evidence is the corroboration by medical evidence.

26. The Doctor who examined the complainant PW-5- stated that there were no bruises and no tears. There was reddening around the labia. Hymen was broken. Findings correspond with forced entry. Page 38 of the record. It is most likely that with what the Doctor calls forced entry into a girl of Five years there were no tears and bruises. It is not possible. She was defiled at 6.30 Pm and examined at 9.30 Pm. There was no fresh injury as the Doctor did not see any bleeding yet according to her the hymen was freshly broken. This medical evidence is doubtful because from the passage I have quoted above on the complainant's evidence, she categorically ruled out penetration. Though penetration need not be the complete insertion of the genital organ of the perpetrator (male) into the female genital organ, where the victim has ruled out penetration by her own testimony, a court of law cannot come to the conclusion that there was penetration. Penetration is ruled out. The complainant stated that she did not feel any pain. With this testimony of the complainant and the Doctor having found no tears or bruises or even bleeding a Doctor cannot convince the court that there was penetration afresh penetration into the genital organ of the minor. I find that the medical evidence is incredible and is unreliable. It does not prove that there was penetration. If the hymen was broken it is unlikely that it happened that day. It also raises doubts as to whether the complainant was defiled on that material day.

27. In this case the complainant gave unsworn evidence. Her evidence required corroboration.

In ***Peter Kiriga Kiune –v- R C.A No. 77/82 C.A.***

> "***where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a viore dire examination, whether the child understands the natute of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of***

sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declaration Act, cap 15. The Evidence Act (Section 124, cap 80).

The Court further stated:-

> ***"It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in*** *Oloo s/o Gai v R* ***[1960] EA 86 the Court of Appeal said that it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath; since the judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand.***
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> ***In*** *Gabriel s/o Maholi v R* ***[1960] EA p 159, again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.***
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> ***In*** *Kibangeny Arap Kolil* ***[1959] EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial judge to warn himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal."***

28. In the absence of corroboration by medical evidence the charge of defilement has not been proved. The evidence is wanting and is insufficient to establish penetration. The broken hymen was most probably not fresh as the presence of inflammation suggests there was an infection. This raises doubts as to when the complainant was defiled. The broken hymen noted by the Doctor cannot support evidence that she was defiled that day in the absence of tears and bruises. The court was denied the results of the laboratory tests which were done as indicated on the treatment notes. Could they have been adverse to the prosecution case. The court cannot tell.

29. The appellant submits that the Magistrate was biased. The trial Magistrate may have erred but there is nothing to prove the presence of bias.

30. On the defence of the appellant, the trial Magistrate stated at Page 53 of the record:

> ***"In his defence the accused person gave the defence of alibi. It is trite law that the burden of proving an alibi rests upon the accused person. It was his duty to call evidence to demonstrate that he was not present at the scene of crime at the date and time of the alleged offence. He failed to discharge this duty and therefore his evidence remains a mere work of mouth. The same is unreliable in law."***

31. This holding is an error and a violation of the right to fair trial. What is trite in law is that the burden of proof in a criminal case rests on the prosecution. The burden never shifts. The accused does not assume the burden to prove his alibi where he raises that defence. By shifting the burden, a miscarriage of justice was occasioned and a violation of right to fair trial. **Article 50 2(a) of the Constitution** provides:-

> ***"Every accused has a right to fair trial which includes the right – to be presumed innocent until the contrary is proved."***

This is a right which cannot be limited.

31. Having considered the evidence and evaluated and for the reasons stated, my finding is that the evidence implicating the appellant was insufficient for want of corroboration of the complainant's evidence. The medical evidence was insufficient and at most doubtful. The rights of accused under **Article 50 of the Constitution** were violated. The charge against the appellant was not proved beyond any reasonable doubts. The appeal has merits. I allow it. I order that the conviction be quashed, the sentence be set aside. The appellant be set at liberty unless otherwise lawfully held.

Dated at Kerugoya this 20th Day of June 2019.

L. W. GITARI

JUDGE